



## STATE OF WISCONSIN – JUDICIAL COUNCIL

### MINUTES OF THE MEETING OF THE WISCONSIN JUDICIAL COUNCIL MADISON, WISCONSIN October 18, 2019

The Judicial Council met at 9:35 a.m. in Room 328NW of the State Capitol Building, Madison, Wisconsin.

**MEMBERS PRESENT:** Chair William C. Gleisner; Sarah Walkenhorst Barber; Judge Michael Fitzpatrick (by phone); Christian Gossett; Duane Harlow; Margo Kirchner; Dennis Myers; John R. Orton; Adam Plotkin; Thomas L. Shriner; Judge Robert VanDeHey; Senator Van Wanggaard (by phone); Judge Jeff Wagner (by phone); and Sarah Zylstra.

**MEMBERS EXCUSED:** Judge Eugene Gasiorkiewicz; Judge Scott Needham; Diane Fremgen; Representative Ott; Ben Pliskie; Adam Stevenson; and Sara Ward-Cassidy;

**SPECIAL GUESTS:** Michaela Paukner (Wisconsin Law Journal); Julie Tessmer Robinson (State Law Library); Paige Scobeck (Hamilton Consulting); and Corydon Fish (WMC).

#### **I. Roll Call and approval of the Minutes of the September 20, 2019 Meeting.**

The roll call was completed and the minutes of the September 20, 2019 meeting were duly approved.

#### **New Business: Report by Senator Wanggaard**

Senator Wanggaard gave an update on the possible new home of the Judicial Council in the offices of the Legislative Council. According to the Senator, he recently met Ann Saperfield and learned that the Legislative Council is still on board with the proposed move. He also recently spoke with Speaker Vos and confirmed that he is supportive of the move. He has also chatted with Senator Fitzgerald and he too is supportive. Where the challenge comes in is before the JCLO meets they have to get something from the Department of Administration regarding staffing issues, but that is expected to arrive

soon. When the Department of Administration provides a report on staffing, JCLO has to approve the move. The Senator does not see any problem moving forward here. Chief Justice Roggensack is also supportive of the move and, in addition, is supportive of the Council. The Senator also stated that he did not like that this was taking so long but he can't do anything to make it move faster. The Senator stressed that the Judicial Council was not going to a part of the Legislative Council and, in fact, the Judicial Council will continue as a completely separate entity. In the Senator's opinion, a move to the Legislative Council will give the Judicial Council an office and a place to receive mail, etc. According to the Senator there is also a possibility that research support could be provided to the Judicial Council on a limited basis and help with freedom of information requests.

Gleisner then reported that he had just received from WMC's counsel a Open Record Request, which Gleisner then read in part to the Senator. Gleisner noted that the Request covers the time from July 1, 2019 down to the present date. then asked when the Judicial Council can move into the Legislative Council offices. The Senator responded that it depends on when the JCLO meets. Concerning the Open Record Request, the Senator stated that to his knowledge he has not created any responsive records. Gleisner said he thought it would be easy to answer the latest Open Record Request because very little, if anything, has been done since July 1<sup>st</sup> and the Senator agreed.

## **II. Discussion by Chair Gleisner regarding the Introduction to this Agenda.**

Gleisner then reviewed the Introduction to the Agenda regarding the powers and duties of the Judicial Council. Gleisner identified a number of procedural bills in the list supplied by Sarah Barber which might possibly be of interest to the Council, including the following: AB33 (expungement of records); AB 58 (service of notice of claims against state officers, etc.); AB 59 (service of certain pleadings and other papers by electronic mail); AB 204 (municipal ordinance enforcement and court procedures); AB 402 (objective standard for disqualification of a judge); AB 403 (also relating to disqualification of a judge); AB 408 (prohibiting destruction of records and evidence); SB 278 (records retained by circuit court); SB 301 (availability of information on crimes); and SB 366 (actions in circuit court alleging discrimination in employment).

Gleisner suggested that the Executive Committee review the legislation he just referenced and consider what bills might be appropriate for consideration by the Council. Tom Shriner questioned how we would do that shriner cautioned that with no budget and no staff we need to be careful not to overextend ourselves. According to Shriner, traditionally topics are suggested by the Supreme Court or the Legislature and the Council then considers that suggestion. Historically, the Council does not go looking for work. Shriner stated that we need to establish a process whereby we can tee up topics without waiting for the Supreme Court or the Legislature to provide us with topics.

Gleisner suggested that we need a "review committee" than can consider input from folks like Sarah Barber. Shriner stated that we should not be wasting our time on bills which

are “going nowhere” and we need to also seek assistance from the State Bar, and we are fortunate to have Sarah Zylstra who sits on the State Bar Litigation Section. Gleisner also stated that we are fortunate to have Senator Wanggaard on the Council who can assist us in winnowing through pending legislation to make certain that we select pending legislation which is likely to have a future in the Legislature. Between Sarah Barber and the Senator we can make a determination of how likely it is that a pending bill actually has the potential to become law.

John Orton then asked if a bill pending in the Legislature has ever been referred to the Judicial Council. Gleisner said he did recall requests from the Legislature many years ago. Gleisner referred to the criminal law bill which Professor Schultz had worked on for many years as an example. The Senator confirmed that the Schultz bill made it to both the Senate Judiciary Committee and to the Assembly Judiciary Committee. Shriner also stated that the Council gets requests to consider Uniform Acts, which ultimately require action by the Legislature. Gleisner stated that some requests to review Uniform Acts came directly from the Uniform Law Commissioners and some came from the Legislature.

John Orton stated that the Council should consider an alternate method of considering and acting on issues referred to the Council. Our history has been that we only issue reports or findings after we have turned over every rock doing research and considered input from stakeholders. But there is a place for issuing a preliminary opinion regarding a particular issue, including the following. One level might be “The Judicial Council does not take a position” on an issue. Another level might be “The Judicial Council has reviewed a matter and has the following concerns.” Another level might be something short of a full blown review where we do some research and identify pros and cons of an issue. In short, Orton stated that we don’t always have to strive for a lawyer review quality opinion concerning a topic. Gleisner agreed and stated that the Council is supposed to do what John suggests by the terms of our 70 year old Statute, §758.13.

**III. Report from Sarah Barber concerning legislative bills (considered with)**

**IV. Report by Sarah Zylstra regarding the State Bar’s Litigation Section.**

Sarah Barber and Sarah Zylstra agreed with Orton’s comments and stated that they were willing to be on a committee if it is limited strictly to issues that clearly impact on practice and procedure. The list that Gleisner read from earlier is too general to be useful. Zylstra stated that the work of the Litigation Section could provide topics for consideration by a committee consisting of the two Sarahs. Zylstra agreed with Gleisner that topics such as service of process by electronic means would be an example of a topic which the Council should consider.

Gleisner stated that perhaps the Council should be exploring ways to adopt PACER in Wisconsin, because under PACER as soon as something is filed it is automatically served on all counsel. Zylstra said that PACER is way more sophisticated than what we have at the state level and will not work on the state level because in some counties it takes days

and days to log electronic submissions. Zylstra then gave an example from her own practice of how bad it is when someone files something with court and then does not serve in on opposing counsel. This is the type of issue that the Council should study.

Gleisner pointed out that the bills he had referenced earlier today were just intended to be examples of the type of topics which the Judicial Council might considered. Zylstra stated that she understood that, but that she would only want to review a subset of bills that she and other members of a relevant committee might consider to be related just to practice and procedure issues. Orton said that he believes that the Legislative Reference Bureau is the source for such topics. Orton again raised the matter of different levels of review.

Gleisner then asked the Senator if it would be appropriate for the Judicial Council, or a committee of the Council, to monitor legislation. The Senator said everybody is a little bit right. He said “look around the table” we have representatives from a number of quarters that deal with the law. And according to the Senator that’s what is unique about the Council. We have so many different viewpoints, both sides of the aisle, the Council is well positioned to provide a very balanced review of topics that it considers. The Senator said he thought it was appropriate for the Council to bring matters forward from the membership and yet also consider requests from those outside the Council. The Senator also approved of Orton’s suggestion that we develop levels of responses.

Sarah Barber pointed out that the LRB list is huge and is not intended to provide guidance to the Council on what topics to take up. Barber also stated that in her opinion the list needs to be shorter and that Orton is right to call for levels of review by the Council.

Gleisner asked Mr. Harlow if the Justice Department had any thoughts on how the Council might proceed in the future. Harlow stated that he would need to discuss how the Council proceeds with the Attorney General. Mr. Plotkin agreed that he would need to confer with the Public Defenders’ Office before commenting. Mr. Gossett stated that he was unaware of what the Das would prefer.

Shriner stated that Gleisner’s review of §758.13 is fine, but it leaves out the fact that we are supposed to have support staff and we don’t. We need to have a committee appointed. Gleisner appointed a committee consisting of Barber, Kirchner and Zylstra and asked that they consider how the Council should proceed going forward.

**The following Agenda Items were not addressed due to time.**

- V. Instruction by Sarah Barber on how to set up legislative notifications.**
- VI. Committee Reports.**
  - A. Evidence & Civil Procedure Committee.**

**B. Criminal Procedure Committee.**

**C. Appellate Procedure Committee.**

**VII. Adjournment.**

Meeting adjourned at approximately 11 a.m.